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Supreme Court of the United States

OCTOBER TERM, 1958

No. 661

UNITED STATES OF AMERICA, Petitioner

v.

ELMER B. WIGGINS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT IN REPLY TO PETITION FOR WRIT

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OPINIONS BELOW

The opinion of the Court of Appeals is reported in 261 F. 2d 113. (Pet. App. 18-30) The District Court did not write an opinion. The trial court, however, filed findings of fact and conclusions of law. (R. 70-75)

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1958. (R. 31) Time for filing the petition for writ of certiorari was extended to and including January 24, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

It is submitted by respondent that the petitioner has not stated all the questions presented in the case and answered by the court below. The questions, as stated by the petitioner, do not correctly state the issues to be determined by this Court upon the petition. The questions set forth below, while related to each other, are separately stated so as to show the three separate issues involved in this case.

I.

Whether the word "vocation" used in the Act (50 U.S.C. App. § 466 (g)) has a theological meaning so as to permit regular and customary performance of duties as an ordained minister to constitute the vocation of a minister of religion while holding down a 40-hour-per-week job in secular or nonreligious work in order to support himself and to pay the expenses of the regular and customary performance of religious duties as a minister, for which the minister receives no pay.

II.

Whether respondent made a prima facie showing that he is an ordained minister under the Act entitled to exemption so as to require a reopening and reclassification under 32 C.F.R. § 1625.2 when he showed that he spent an average of 15 hours per week in the regular and customary performance of his duties as an ordained minister, which was his vocation notwithstanding his holding down a 40-hour-per-week job as a crane operator to support himself and to pay for expenses incurred in the performance of his duties as a minister for which he received no pay.

III.

Whether the judgment of the Court of Appeals ought to be affirmed because the local board (in refusing to reopen respondent's case, from which he had no right of appeal to

the appeal board, when he showed a prima facie case) denied respondent procedural due process of law and a full and fair hearing on his request for a reopening under 32 C.F.R. § 1625.2 by holding as a matter of law that respondent was not entitled to the ministerial exemption because he did not have a diploma and did not receive pay for performance of his ministerial duties and also did not have a church.

STATUTES AND REGULATIONS INVOLVED

Universal Military Training and Service Act, 62 Stat. 604, 611, 622, 624:

Section 6 (g) [50 U.S.C. App. § 456 (g)]:

> (g) Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled, shall be exempt from training and service (but not from registration) under this title.

Section 12 (a) [50 U.S.C. App. § 462 (a)]:

> Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Section 16(g) [50 U.S.C. App. § 466(g)]:

(g) (1) The term "duly ordained minister of religion" means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

(2) The term "regular minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

(3) The term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect or organization.

The Regulations involved are 32 C.F.R. § 1625.1 to § 1625.4 and 32 C.F.R. § 1625.11 to § 1625.14.

1625.1 Classification Not Permanent.—(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.—32 C.F.R. § 1625.1.

1625.2 When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classifications of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the

local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control. —32 C.F.R. § 1625.2.

1625.3 When Registrant's Classification Shall Be Reopened and Considered Anew.—(a) The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant.

(b) The local board shall reopen and consider anew the classification of a registrant to whom it has mailed an Order to Report for Induction (SSS Form No. 252) whenever facts are presented to the local board which establish the registrant's eligibility for classification into Class I-S because he is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning.—32 C.F.R. § 1625.3.

1625.4 Refusal to Reopen and Consider Anew Registrant's Classification.—When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In

such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.—32 C.F.R. § 1625.4.

1625.11 Classification Considered Anew When Reopened. When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.—32 C.F.R. § 1625.11.

1625.12 Notice of Action When Classification Considered Anew.—When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.—32 C.F.R. § 1625.12.

1625.13 Right of Appeal Following Reopening of Classification. Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.—32 C.F.R. § 1625.13.

1625.14 Order to Report for Induction to Be Canceled When Classification Reopened. When the local board has reopened the classification of a registrant, it

shall cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant. If, after the registrant's classification is reopened, he is classified anew into a class available for service, he shall be ordered to report for induction in the usual manner.—32 C.F.R. § 1625.14.

STATEMENT

The District Court, on a nonjury trial, found the respondent guilty and sentenced him to serve a term of 24 months for a violation of the Act in refusing to perform civilian work as ordered by his local board. (R. 64-65) The trial court made findings of fact and conclusions of law which were filed upon request of respondent. (R. 70-75) The findings of fact made by the District Court as to the time devoted by respondent to performance of his duties as a minister of religion are incomplete and incorrect, as will be hereinafter shown, because they omit 150 hours spent in travel to perform his duties as a minister during the six-month period in question by respondent. (R. 73-74)

Respondent's conviction was reversed by the Court of Appeals because the court found that the undisputed evidence showed there was no basis in fact for the board holding that respondent was not entitled to the exemption as a minister, since he made a prima facie case when he showed that he was the leader and the minister of a small group of Jehovah's Witnesses under his care and regularly and customarily, as his vocation, performed his duties as such minister and leader of the group. (Pet. App. 18-30)

Respondent would be content here merely to rely upon the accurate statement of the facts appearing in the opinion of the Court of Appeals (Pet. App. 25-29) but the facts there stated seem to be impliedly challenged, or at least confused, in the statement made by petitioner. (Pet. 4-9) The petitioner has failed to make clear in its statement of the facts that from the date of respondent's registration on April 6, 1953, to October 4, 1956, Wiggins' draft board file

showed merely that he was an ordinary member or minister of Jehovah's Witnesses without a position of leadership. After October 4, 1956, however, the draft board file showed that his status had changed to a position of leadership in the organization when he was appointed Book Study Conductor or presiding minister of the Foley, Alabama, group of the Robertsdale, Alabama, Congregation of Jehovah's Witnesses.

In order to show and make clear this vital change from ordinary membership in the organization to a position of leadership as his vocation (considered to be vital and crucial to the Court of Appeals) a more detailed consideration of the facts as they appear after October 4, 1956, should be considered by this Court. Respondent will omit at this point a detailed statement of the facts leading up to and including the final I-O classification by the appeal board, made on April 30, 1954. Since the correctness of the holding by the Court of Appeals hinges on the new facts submitted to the local board on the request for a reopening and reclassification, made on October 4, 1956, showing a change in status while the case was before the appeal board, a detailed statement of these facts will now be made.

The local board notified Wiggins, on August 4, 1956, to report for an armed forces physical examination. (F. 10, 101)[1] On September 11, 1956, he was found acceptable for service. (F. 10, 94-115) He was promptly mailed a form offering him three types of work and asking him to indicate what type of civilian work he chose to perform as a conscientious objector. (F. 10, 88-92) When Wiggins refused to make a choice the local board notified him of the three places they had chosen for him to work and asked him to select one of them. (F. 87) Wiggins responded by a written request to reopen his classification, which was received by the local board on October 4, 1956. (F. 11, 83) This request was based on a change in status since his last classification.

[1] Figures preceded by the capital letter F. are the pages of the draft board file.

He told the board: "I have recently been appointed Bible study conductor for the Foley area of our local congregation. Enclosed is a photostatic copy of my appointment by the Watchtower Bible & Tract Society of Brooklyn New York. It is my duty to study with these of our congregation in order to aid them to become more mature in there [sic] service."

A letter certifying the appointment of Wiggins as Book Study Conductor by the Watchtower Bible and Tract Society, the legal governing body of Jehovah's Witnesses, was also submitted to the board along with the request to reopen. The letter states: "The Society is herewith appointing the following publishers as servants, to the positions stated below. Each individual is obligated to carry out his duties and responsibilities faithfully and obediently as unto Jehovah. He should become thoroughly familiar with his duties as they are outlined in the booklet *Preaching Together in Unity*. Where changes are made, the newly appointed servant will receive from the former servant all forms, records and files pertaining to his duties. Please retain this letter as a permanent record in the congregation file. Book study conductor(s): Add: Elmer B. Wiggins."[2] (F. 86).

On the same date there was also filed by Wiggins with the local board a letter explaining why it was necessary for him to do secular work. In this he told the board:

"The only reason I am working now is to be able to carry on my ministerial work. I am appointed to take care of the Foley area of our congregation to aid them in becoming better ministers. I attend a Bible study every Wednesday night of which I am conductor and on Saturday I go and carry them in the magazine work which is one step in aiding them to become more mature in their work.

[2] See appendix (booklet, *Preaching Together in Unity*) for ministerial duties for office of Book Study Conductor occupied by Wiggins, pages 41-42, 46, 47.

"Then we have our other congregational meetings on Friday and Sunday evenings when I take from two to seven besides myself to those meetings. My traveling for one weeks service ranges from 200 to 400 miles in one week. So for this reason I have to work. There is never any charge for any of my service to aid these people. This is what I have dedicated my life to doing is aiding people to learn more about Jehovah's purposes for mankind." (F. 85)

Also accompanying the request to reopen the classification was a certification by the presiding minister of the Robertsdale, Alabama, Congregation of Jehovah's Witnesses showing the time devoted by Wiggins (exclusive of travel time) to the performance of his duties as a leader. He told the local board: "Recordwise (officially) here are some figures based only on the past six months activity:

42 Hrs. spent in door-to-door ministry

34 Hrs. spent in conducting weekly meetings in Bible and Bible publications.

144 Hrs. spent in research and study in Bible and and Bible aids as a basis for ministry material, for talks from the platform and other phases of activity.

6 Hrs. reading as summary, study material in the Watchtower magazine before entire congregation. This meeting is regular feature of the Robertsdale Alabama congregation which is held on Sunday evenings.

226 Total hrs devoted ministerial work." (F. 84)

The local board, on October 9, 1956, directed Wiggins to appear before it for the purpose of reaching an agreement on what kind of civilian work he would do. (F. 11, 81-82). On October 17, 1956, the local board received a letter from Paul L. Schell, which was written at the request of Wiggins'

To this total should be added 150 hours during the six-month period covered in this report for travel time devoted to the ministry.

mother. Schell states, among other things, that: "Myself, I do not belong to this religious group, but do admire anyone who is devoting his or her life to making this world a better place to live. Elmer Wiggins seems bent on doing his part to make it a better life to many." (F. 79)

On October 24, 1956, the local board conducted a hearing upon whether Wiggins would agree to do civilian work, and at which time he submitted additional proof in the form of statements from a large number of persons supporting his previous request to reopen his classification. (F. 11, 74-77) One certificate stated: "I know that Elmer B. Wiggins is conscientiously applying himself as a minister. He not only prepares and delivers sermons from the platform at congregation meetings and from house to house regularly but acts as leader of a Service Center group and as Servant to the group leads them in a study of God's Word, the Bible and in every way possible aids and trains them in the worship and service of the Most High God as is set out in the Bible. In this way he is faithfully rendering aid that is necessary and helpful to many who are striving to learn to know and to do the will of the Heavenly Father." (F. 74)

Another statement submitted to the board on October 24, 1956, showed as follows: "I have known Elmer Wiggins for the past seven years and know him to be very sincere in his ministerial work. He is a Bible study conductor for a group in Foley and they are dependent on him to come and aid them to get a better knowledge of the Bible. He does this by regularly studying with them every Wednesday night and by taking them in his own car at his expense into the field service every Saturday A.M. to encourage others to study the Bible more and to aid them if they desire. He also takes part in the programs presented at the Kingdom Hall and goes into the field service more than just on Saturday. He does this willingly as this is what he dedicated his life to do—to make known Jehovah God's name." (F. 75) Another person described some of Wiggins' duties as a minister and leader among Jehovah's Witnesses as follows:

"These include preaching in the homes of the people of good will toward God and from the platform at congregation meetings. In addition he has the oversight of a group, leading them in the study of God's Word and in service to God as ministers, aiding and training these in every way possible to carry out their dedication vows." (F. 73)

Another certificate reads, in part: "After his dedication and preaching activity and earnest application of himself to the course in Theocratic Ministry School he became qualified for appointment over a group in the Foley, Alabama, area where he has full charge of all Christian activity from that Service Center and to my knowledge he has been regular and very active in this very responsible assignment." (F. 72) Another stated: "He takes part in all phases of the preaching and teaching work of Jehovah's Witnesses, attending the Bible study meetings held three nights a week and is a member of the Theocratic Ministry School." (F. 71)

In addition to these several certificates quoted from there were 15 other certificates submitted, making a total of 21, supporting Wiggins' written request to reopen the classification showing the dedication, the leadership, the regularity and the consistency of Wiggins in devoting himself to the ministry as his vocation or chief purpose in life. (F. 53-70)

The local board made a memorandum of the hearing conducted by the board as to his refusal to perform civilian work, saying, among other things: "Mr. Wiggins stated that he could not accept above stated work, and that the only type of work he would be willing to perform would be that of full time minister as Jehovah's Witness." (F. 52) The board, on the following day, October 25, 1956, notified the respondent about its ruling on his written request to reopen and the additional written evidence above described. The board said: "The local board acknowledges receipt of your letter of October 2, 1956 requesting that your case be reopened and that you be classified as a minister as per evidence submitted with your letter. This evidence has been

considered, and in addition thereto, the additional evidence which you submitted in person at your personal appearance October 24, 1956 has been considered. The board was of the opinion that the evidence submitted did not warrant the reopening of the case." (F. 51)

Wiggins was thereafter processed by the local board as a conscientious objector available for civilian work. (F. 44-49) On December 18, 1956, he was ordered to report to the Alabama State Hospital at Tuscaloosa to perform "institutional work" on January 7, 1957. (F. 42) He refused to perform the work and was ordered to report again. (F. 11, 33) He failed and refused to report the second time and it was recommended that he be prosecuted. (F. 11) He was prosecuted. (R. 2)

Upon the trial of the respondent the District Court received evidence as to what occurred at the discussion between Wiggins and the members of the local board about whether the above-described new and additional documentary evidence was sufficient to constitute a prima facie showing justifying his reclassification as an exempt minister on a reopening of his case. (R. 29-30, 39, 51-52)

The clerk of the local board testified that at the October, 1956, hearing, when the board discussed with Wiggins his request for a reopening, the board "didn't consider him as a full-time minister with the other work that he was carrying on." (R. 29) She further testified that the board accepted as true the contents of the certificates filed by Wiggins in support of his request for a reopening. (R. 30)

Respondent Wiggins testified: "If I recall, when we were discussing civilian work, I believe it was at that hearing, the local board told me that to be a minister one had to be a paid one and also had to have his own church, and then I asked them, after I had presented some evidence, if they would consider a reopening of the case, and I asked them also as to what it would take to be a minister in their sight, and they said they did not know." (R. 39)

The mother of the respondent, Alice Wiggins, testified as to what the members of the local board said on the occasion of the October, 1956, discussion about respondent's request for reopening. She said: " . . . they still indicated they were not going to consider his ministerial claim. Elmer asked 'If I am not a minister, will you please tell me what a minister is?' Mr. Faulk, a member of the board, said 'I don't know, you will have to go to someone that knows more than I do.' Then later, Mr. Still turned to Elmer, and he said 'you know, don't you, that I can give you two years now and as soon as you get out, I can give you two more years.' . . ." (R. 51, 52) She also testified: " . . . there was one thing about what they termed a minister was, before Mr. Faulk answered this question of Elmer's, and he said to him a minister can only be one that was paid, that had a diploma and had his church, and the main thing was that they were paid for their ministerial work." (R. 52)

DISCUSSION OF PETITIONER'S REASONS FOR GRANTING WRIT

The respondent denies that the writ of certiorari may be granted by this Court on the grounds that the decision below conflicts with or is out of harmony with the holdings of this Court in *Cox* v. *United States*, 332 U.S. 442 (1947), and *Dickinson* v. *United States*, 346 U.S. 389 (1953). The Court should not grant the writ on that ground. The respondent denies that the holding of the court below misinterprets, misconstrues or misapplies Section 16 (g) of the Act (50 U.S.C. App. § 466 (g)). The decision of the court below is well within the letter and spirit of Section 16 (g) of the Act.

I.

The Holding Does Not Conflict with the Cox Decision.

The opinion in *Cox* v. *United States*, 332 U.S. 442 (1947), was not concurred in by a majority of the justices of the

Court. Only four justices agreed to the opinion. A judgment was filed affirming the three convictions that was the judgment of the majority of the justices. (*Cox* v. *United States*, 332 U.S. 442, 443 (1947)) Mr. Justice Frankfurter did not join in the opinion but merely concurred in the result. (*Cox* v. *United States*, 332 U.S. 442, 445 (1947)) An equal number of four justices took a view opposite to the view expressed by Mr. Justice Reed that there was basis in fact for the denial of the claim for exemption as a minister of religion made by each of the three registrants in that case. There were two separate dissenting opinions, each joined in by two justices. (*Cox* v. *United States*, 332 U.S. 442, 455, 457)

In *Cox* v. *United States*, 332 U.S. 442 (1947), in the opinion of four justices, hereinafter referred to as the opinion, it was not held that the vocation of the ministry excluded full-time secular work. The opinion did not hold that the offices of Pioneer, Company or Congregation Servant and Book Study Conductor in the organization, when pursued as a vocation, could not each justify an exemption. The opinion merely held that each of the registrants involved failed to make a full and complete showing of leadership and dedication to the ministry of Jehovah's Witnesses sufficient to justify the exemption. (*Cox* v. *United States*, 332 U.S. 442, 451 (1947). Another basis for the opinion in *Cox* v. *United States*, 332 U.S. 442, 451 (1947), was that the only documents submitted by the three registrants were their own and not instruments by others certifying to their ministry. The opinion stated that Cox' documents suggested but did not prove he was a Pioneer. (*Cox* v. *United States*, 332 U.S. 442, 451 (1947)) But compare what Justice Douglas said in the same case to the contrary at 332 U.S. 442, 456.

The opinion in *Cox* v. *United States*, 332 U.S. 442, 451 (1947), also held that there must be "definite evidence of his full devotion of his available time to religious leadership. The opinion did not state that "available time" meant "full

time." The opinion did not suggest or state that the full time of a minister was required to be shown so as to exclude time devoted to other activities or that all of the time of the registrant during each 24-hour day must be devoted exclusively to performance of religious duties as a minister. The opinion suggested that even when "a small portion" of the ministers' time was devoted to the ministry, it would be sufficient to entitle them to the exemption when it is accompanied by a strong showing to the local board "of the registrants' leadership in church activities and the dedication of their lives to the furtherance of religious work." *Cox* v. *United States*, 332 U.S. 442, 452 (1947).

It is true that Roisum and Thompson in *Cox* v. *United States*, 332 U.S. 442 (1947), occupied the office of Book Study Conductor, as well as the office of Congregation or Company Servant, as it was then called. The Book Study Conductor office held by those two men is the same office as that held by Wiggins. But the opinion did not hold that the office would not entitle a registrant occupying it to an exemption. It merely held that the type of documents submitted by Roisum and Thompson (contrary to what was said by Justice Douglas in his dissent) did not make a strong showing of leadership and dedication to performance of those religious duties. *Cox* v. *United States*, 332 U.S. 442 (1947).

The opinion of the Court of Appeals in this case found that the file of Wiggins showed that (1) he was wholly dedicated to the performance of his duties, (2) he engaged in the performance regularly and customarily each week and not incidentally or irregularly, (3) he engaged in them as a leader of a group of the congregation and thus acted as an assistant pastor to the congregation servant and (4) he engaged in the performance of these duties, or that he spent his available 15 hours weekly in them, as his vocation, even though he spent 40 hours per week doing work as a crane operator to support himself in his ministry. (Pet. App. 25-30) These findings of the Court of Appeals are

amply supported by the documentary evidence submitted by Wiggins to the local board in October of 1956 to support his request for reopening. See the summary of this new evidence showing a change of status above, at pages 8-15, *supra*, this brief.

It is this "far stronger showing" (*Cox* v. *United States*, 332 U.S. 442, 451 (1947)), and the "definite evidence of his full devotion of his available time to religious leadership" (*Cox* v. *United States*, 332 U.S. 442, 451 (1947)) that were submitted to the local board by Wiggins that clearly distinguish his case from *Cox* v. *United States*, 332 U.S. 442 (1947). Another distinction should be mentioned. It is that Wiggins' claim was supported by a photostatic copy of the letter of appointment by the governing body of Jehovah's Witnesses to his position of leadership as a minister and also by the certificates of 21 other persons about his leadership and the performance of his duties as his vocation which also distinguish this case from *Cox* v. *United States*, 332 U.S. 442 (1947). But Justice Douglas said at 332 U.S. 442, 456, such a showing was made by outside evidence produced by the three registrants involved in that case, which is the same type of proof found to be satisfactory by this Court in *Dickinson* v. *United States*, 346 U.S. 389, 392-393 (1953).

There is another reason why the opinion in *Cox* v. *United States*, 332 U.S. 442 (1947), does not provide grounds for jurisdiction in this case. It is that such opinion was joined in by only four justices and so it cannot, therefore, be considered as an opinion of this Court or a holding of this Court. The fifth justice who concurred in the judgment did not concur in the opinion but only in the result.—*Cox* v. *United States*, 332 U.S. 442, 455.

It is submitted that by reason of the absence of an opinion of the Court in *Cox* v. *United States*, 332 U.S. 442 (1947), and also the above-shown plain material differences between the facts in the case of Wiggins and the cases of Cox, Roisum and Thompson that the opinion in *Cox* v. *United States*, 332 U.S. 442 (1947), is distinguished, which

makes absent from this case any conflict which gives jurisdiction to this Court.

II.

The Erroneous Dictum of the Court in the Dickinson Case Is Not a Holding and the Opinion of the Court Below Cannot Be Said to Be in Conflict with the Dickinson Decision.

This Court in *Dickinson* v. *United States*, 346 U. S. 389 (1953) at page 395, said that preaching "part time or half time, occasionally or irregularly, are insufficient to bring a registrant under Section 6(g)." The statement that it must be more than "part time or half time" is obiter dictum. It was not necessary to the holding. Dickinson was filling two offices that required him to devote 150 hours per month to the performance of his duties. Since he was not preaching "part time or half time" the statement made in the opinion was mere obiter dictum. It cannot be said to be a holding of the Court on the facts of the case. Inasmuch as it was not a holding of the Court the statement cannot be used as a basis for jurisdiction on the grounds of a conflict between the holding below and the holding of the Court in *Dickinson* v. *United States*, 346 U. S. 389 (1953).

The dictum of the Court appearing in the words "part time or half time" is not consistent with, but is actually in conflict with, the words of the statute. Section 16 (g) of the Act (50 U. S. C. App. § 466 (g)) says that an ordained minister is exempt "who as his regular and customary vocation preaches and teaches" his religion to others. That section does not say anything about full time being required and it says nothing about "part-time" or "half-time" teaching and preaching not constituting a "regular and customary vocation."

The word "vocation" as used in that section, as will be shown hereinafter, when given its proper ecclesiastical or theological sense or meaning (as intended by Congress)

does not require full time to be devoted to teaching and preaching. Since full time is not required by the section then less than "full time," such as "part time" or "half time," may be regularly and customarily devoted each week to preaching by an ordained minister as his "regular and customary vocation" and still he would be entitled to the exemption.

When Congress legislated on the subject of exemption of ministers of religion it was legislating in the theological or ecclesiastical field of endeavor and not legislating in another field of different secular occupations. Other deferred employments of necessity which contributed to the national welfare were left to the discretion of the President, to be granted and defined by him to require full time. But the exemption from service to ministers was not thus delegated.

Since the exemption here granted by Congress pertains exclusively to the theological or ecclesiastical field, it must be admitted that Congress intended that the word "vocation" in the Act be given ecclesiastical or theological meaning, which appears in the dictionary. Congress did not put a non-theological meaning on the word by defining it with other than the theological definition given to the word in the dictionary. This Court must admit that Congress did not have a non-theological meaning in mind when it used the word in the statute relating to theological work by a minister. Since ordinary theological meaning must be ascribed to the word and not its non-theological meaning it is appropriate to look to the dictionary for a definition of the theological term.

Webster's New International Dictionary of the English Language, Second Edition Unabridged, Merriam-Webster, 1950, at page 2854, column 2, defines "vocation": "(4). Theol. *a* A calling to the service of God in a particular station or state of life, esp. in the priesthood or religious life, as shown by one's fitness, natural inclinations, and, often, by conviction of a Divine invitation. *b* The

station or state of life to which one receives such a calling. c. An official invitation to a particular ecclesiastical office, as a pastorate."

There is absolutely nothing in the report of Congress (Report No. 1268, Senate, 80th Congress, 2d Session, May 12, 1948) that indicates that Congress intended to narrow the word "vocation" or change it so as not to give it the theological meaning which, for the purposes of this case, is the ordinary meaning for the word. See page 12 of the Report. The Report merely shows that Congress intended not to extend the exemption to the "members generally" and confine it to the "leaders." Nothing there indicates that less than the ordinary theological meaning of the term was intended. The Report shows that the definition of the term "regular or duly ordained ministers of religion" is "that which was contained in the 1917 Selective Service Regulations."

These 1917 regulations were never interpreted to require full time or to prohibit part-time or half-time performance of ministerial duties. In 1917 the ordinary meaning of the term "vocation" was given in *The Century Dictionary and Cyclopedia*, Century Company, New York, 1900, Volume 8, page 6779. It says: "A calling or designation to a particular activity, office or duty; a summons; a call: in theol., a call, under God's guidance, to the Christian life or some special state, service, or ministry. 'Follow thou thy vocation, and serve the king when he calleth thee.' —Latimer, 1st Sermon bef. Edw. VI., 1550. 'Heaven is his vocation, and therefore he counts earthly employments avocations.'—Fuller, Holy and Profane State, IV. ix 10. 'The golden chain of vocation, election, and justification.' —Jer. Taylor. 'Where there is the perception of an ideal, we may expect to find the sense of a vocation.'—J. R. Seeley, Nat. Religion, p. 127."

The only limitation that appears to have been intended by Congress upon the word "vocation" appearing in Section 16 (g) of the Act shows up in Section 16 (g) (3). It is

said that the terms "regular or duly ordained minister of religion" do not include one who "irregularly or incidentally preaches and teaches," and that the term "ordained minister" does not include one who does not regularly, as a vocation, teach and preach the principles of religion."

The meaning of the words "irregularly" and "incidentally" should now be considered. *Webster's New International Dictionary of the English Language*, Second Edition Unabridged, Merriam-Webster, 1950, at page 1313, column 1, defines "irregular", as: "1. Not regular: not according to established law, method or usage; not conformable to nature, to the rules of moral rectitude, or to established principles; not normal; disorderly; unmethodical; erratic; not straight; not uniform; as, an irregular line or figure; an irregular verse; an irregular proceeding; irregular motion; irregular conduct. 2. Not belonging to or having conformed to, the requirements of some particular group or organized body; as, an irregular physician. 3. Showing a lack of uniformity. 4. Not conforming to the rule of the church; having some irregularity that disqualifies for ordination, for the exercise of orders already received, or from obtaining benefice." At page 1257, column 1, of the same dictionary the word "incidental" is defined as follows: "1. Happening as a chance or undesigned feature of something else; casual; hence, not of prime concern; subordinate; as, an incidental expense."

It is submitted to the Court that a proper use of the word "vocation" and the words "irregularly" and "incidentally," as they appear in the statute, does not require that a minister of religion preach full time. It does not prohibit him from having a full-time secular job to sustain himself in his vocation of the ministry in order to be entitled to the exemption.

To give meaning to the statute that prohibits "part-time" or "half-time preaching" while working 40 hours per week at secular work would unfrock thousands of

clergymen, preachers and leaders throughout the South and the Southwest (within the Fifth Circuit) and in all the rural areas of the United States. It would remove from congregations all the ministers of a large number of evangelical religious denominations in the country, of which Mormons, Mennonites and Jehovah's Witnesses are the most prominent. All of these and a multitude of others prohibit the large majority of their ministers from receiving any pay for their ministry. Those ministers are forced to hold down full-time secular jobs in order to live and continue as leaders in the ministry where they preach only "part time" or "half time."

The Court should withdraw, as erroneous obiter dictum, the statement about "part time" and "half time" used in *Dickinson* v. *United States*, 346 U. S. 389, 395 (1953), because it is in conflict with the terms of the Act. Since the statement is obiter dictum it should not be used by this Court as a basis for holding that there is a conflict of decision between the holding of the court below and the decision of this Court in *Dickinson* v. *United States*, 346, U. S. 389 (1953). In the event that this Court finds there is a conflict, then, if, as and when time for a final decision arrives, after granting the writ in this case, this Court should overrule or set aside, as erroneous, the words about "part-time" and "half-time" performance of ministerial duties not being enough to constitute the ministry as the vocation of the minister so as to entitle him to the exemption. The respondent here calls upon the Court to reconsider such statement and when the proper time comes to extirpate it from the law as being in conflict with the theological definition of the word "vocation" which is the proper definition to give to the term according to the Act.

While one of the undersigned counsel, Hayden C. Covington, has stated to this Court above that it made an erroneous obiter dictum about "part-time" and "half-time" preaching not being enough to get the exemption,

now is the time for the said undersigned counsel to inform the Court that he contributed to such erroneous statement and became a party to it by what he stated in his brief in the case of Dickinson. This he did by submitting the issue of the case of Dickinson to this Court in *Dickinson v. United States*, 346 U. S. 389 (1953), upon the full-time Pioneer ministerial status of Dickinson as a Pioneer. He took the position that this office entitled Dickinson to the exemption since it was undoubtedly his vocation from the time-devoted standpoint.

When said counsel did this in the *Dickinson* case he overlooked that the duties Dickinson also performed as Congregation Servant may also alone constitute his vocation, even though they were performed by Dickinson part time. This office of Congregation Servant filled by him also would have entitled Dickinson to the exemption because of the position of leadership that the Congregation Servant held. Both the office of Pioneer and the office of Congregation Servant were positions of leadership. Each one entitled Dickinson to the exemption. The undersigned counsel, Hayden C. Covington, apologizes to the Court for contributing to the error of obiter dictum that now must be complained about in this case in order to uphold the law as passed by Congress which seemingly was properly interpreted by the court below. Said undersigned counsel, therefore, says to the Court that the statement which appears at the middle of page 35 of the Brief for Appellant in *Dickinson v. United States*, 346 U. S. 389 (1953), is now renounced as error and contrary to law and the Act.

The extensive definition from the dictionary quoted from at bottom of page 35 and at the top of page 36 of the Dickinson brief is the same one quoted from above. That definition does not call for full-time performance of ministerial duties to constitute the ministry "vocation," and Congress does not disapprove or renounce this usual and regular definition of the term.

III.

Seriatim Reply to Certain Statements Appearing in the Reasons for Granting the Petition for Writ of Certiorari.

Respondent denies the statement at the bottom of page 9 that he occupied a minor post and that he spent only ten hours per week in the performance of his duties, of which only three are devoted to door-to-door evangelizing. This statement ignores approximately five hours of travel time devoted to acting as leader of the Foley, Alabama, group of the Robertsdale, Alabama, Congregation of Jehovah's Witnesses. The 12 hours per week, over and above the three hours devoted to evangelizing, constituted his ministerial duties.

While respondent had a position that was minor, as compared with the Congregation Servant, as far as the entire congregation was concerned, he occupied an important position in the over-all organization arrangement of Jehovah's Witnesses. He was an ordained minister and the duties performed by him were duties of leadership. As far as the Foley group of the congregation were concerned he occupied the same position to them as did the Congregation Servant to the Robertsdale, Alabama, Congregation of Jehovah's Witnesses. The fallacy of the argument of the Government can be demonstrated. Suppose the same argument were made about a lieutenant in the army. He has a minor post and commands a small group, smaller than the group commanded by the captain, the major, the colonel and the general. Wiggins still occupies a position of leadership over his small group just as does the lieutenant. As he is a leader and an officer, so is Wiggins.

Petitioner says that Wiggins is not to be compared with an assistant pastor in an orthodox church and that he is "more nearly akin to Sunday school teachers," as stated on page 10 of the petition. He is not a Sunday school teacher but is an ordained minister presiding over

the Foley group and by performing similar duties to that group, occupies in such group the position that the Congregation Servant occupies in the Robertsdale Congregation. All the duties performed by the respondent over the Foley group are duties of leadership, the same as the duties of the Congregation Servant are duties of leadership.

The position of petitioner that it can compare the duties of respondent to those of a Sunday school teacher violates the ecclesiastical determination of the governing body of Jehovah's Witnesses that he is a minister and that the duties performed by him are duties of a minister. That ecclesiastical determination is binding upon the petitioner and this Court. (*Gonzales* v. *Archbishop*, 280 U. S. 1, 16-17; *Kedroff* v. *Saint Nicholas Cathedral*, 344 U. S. 94, 116; *Watson* v. *Jones*, 80 U. S. (13 Wall.) 679, 728) The comparison attempted to be made is odious, as comparisons usually are, and it is also in conflict with the Act that protects each minister who is "preaching" his religion as his vocation. It is not required that each minister get the approval of his religion from some other religion or show that it conforms to the orthodox before he is entitled to the exemption.

The statement at the bottom of page 10 and at the top of page 12 about the Watchtower Society seeming to have accepted "as fair the administrative interpretation of minister exemption with respect to its membership" is an erroneous statement. It was consented to, under the unbearable weight of the multitude of lower court opinions in innumerable prosecutions of its leaders in the congregations throughout the land during the last 18 years and refusal of the State and National Directors to take any administrative action to protect any of its servants and leaders from thousands of erroneous draft board rulings, except (1) its full-time servants and (2) only one of the several leaders in each congregation who is known as the Congregation Servant.

The straw that broke the back of the Watchtower Society's original claim that all of its ministers below the level of the Congregation Servant were leaders was the obiter dictum in *Dickinson* v. *United States*, 346 U.S. 389, 395 (1953), that to be entitled to the exemption the minister must devote more than "part time" or "half time" to the ministry. In order to get administrative relief from the National Selective Service Appeal Board and having no administrative hope of getting the administrative agency to overrule the obiter dictum in *Dickinson* v. *United States*, 346 U. S. 389, 395 (1953), the Watchtower Society agreed to the proposals made by the National Selective Service Appeal Board, which are referred to on page 12 and quoted at pages 34-36.

Subject to the approval of this Court of the holding of the court below the Watchtower Society, in order to get relief from the pressure it has been under for so many years, is withdrawing the concession that it made through its General Counsel in the answers to questions 14 and 19. These answers were made primarily because of the dictum appearing in *Dickinson* v. *United States*, 346 U. S. 389, 395, which dictum is now being challenged as erroneous and this Court is requested to overrule such dictum.

This Court is not bound by the narrow and restrictive administrative treatment of the Watchtower Society's congregational leaders throughout the land during the last 18 years that it has been forced to endure because of the inability to get more favorable interpretation of the law by the lower courts.

The petitioner attempts to place an alarming construction upon the figures shown in the table of the recent letter written by the Watchtower Society's General Counsel to General Hershey, which appears as an appendix to the petition for writ of certiorari. See pages 37-42. To begin with, the letter shows that the figures were incomplete because they were hastily prepared (Pet. App. 42) and it is believed that when the survey that is now being con-

ducted of the entire organization is made it will show that (1) the number of leaders among Jehovah's Witnesses in comparison with the total membership will be as small as many other large religious organizations and that they are not excessive; (2) the number of men of draft age who have positions of leadership will be proportionately small; and (3) the number of men of draft age who have positions of leadership but who have been denied the draft exemption as ministers will be very great; or, to put it another way, the number granted the exemption will be infinitesimal, which is attested to by the large number of prosecutions of Jehovah's Witnesses under the Act.

In any event, it is wrong for the petitioner to attempt to frighten the Court by this type of policy argument. It is really a question of law. If a fearless and correct construction of the Act and application of it to the facts in this case result in Wiggins' being held exempt, then it is immaterial how many other people in the same situation will be likewise entitled to the exemption. The remedy of the petitioner is in Congress and not in this Court.

IV.

Conflict with Other Courts of Appeals.

It is admitted that upon the question of performance of secular work full time being no basis in fact for the denial of the ministerial exemption there is a conflict between the holding of the court below and the holdings in *Bradshaw* v. *United States*, 242 F. 2d 180 (10th Cir. 1957), *Capehart* v. *United States*, 237 F. 2d 388 (4th Cir. 1956), and *United States* v. *Hill*, 221 F. 2d 437 (7th Cir. 1955); as claimed on page 16 of the petition. As to the holding of the court below that Wiggins occupied a position of leadership there is no conflict because in none of those cases does it appear that the registrants occupied the same or similar position of leadership as occupied by Wiggins. In the case of *United States* v. *Diercks*, 133 F. Supp. 78

(E. D. Ill. 1954); aff'd 223 F. 2d 12 (7th Cir. 1955), there is a conflict, not only on the performance of full-time secular work, but also on the showing of leadership. The two cases on that point are the same, in that Diercks was an appointed leader to the full-time ministry post of Pioneer and devoted 100 hours to the field missionary work monthly and Wiggins occupied a different position of leadership. Compare *Martin* v. *United States*, 190 F. 2d 775 (4th Cir. 1951); cert. denied 342 U. S. 872 (1951). The respondent takes the position that these decisions are erroneous, yet he admits that they conflict with the decision below and provide the basis for jurisdiction to grant the writ of certiorari.

V.

The Question Is Important.

While the petitioner does not rely upon the ground of importance of the question presented that ground is also a basis for jurisdiction in this case. The case is important to the 226,000 Jehovah's Witnesses because they are faced with the loss of exemption for over 3,000 ministers of draft age, who are leaders. The case becomes even more important to Jehovah's Witnesses when it is considered that in the event of an emergency the draft age can be raised and this would affect approximately 20,000 ministers who are leaders in the organization. It is equally important to a large number of other religious organizations and congregations in the country whose ministers pursue the ministry as their vocation but who also do secular or nonreligious work full time to support themselves in the performance of their vocation of the ministry. It is also important for this Court to determine whether Congress actually intended or meant by the word "vocation" it used in the Act to bar such ministers from claiming their exemption, the dictum in *Dickinson* v. *United States*, 346 U. S. 389, to the contrary notwithstanding.

CONCLUSION

In view of the great national importance of this case it is submitted, that when the writ is granted the case not be put on the summary docket but that full argument be allowed before the case is finally submitted to the Court for decision.

Respectfully submitted,

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